PRINCIPLE OF UTMOST GOOD FAITH & DISCLOSURE CLAUSE IN INSURANCE SECTOR: PERSPECTIVES FROM DASBODH [MANACHE SHOLK NO.19]

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**Abstract:** Indian Marine Insurance Act, 1963 is almost based upon the English Counter part but still the significance of insurance law in Indian legal studies has not yet been realized. This is due to the rules of law prior to the Act, 1963 have been saved by the section 91 of the Marine Insurance Act, 1963.

Now UK has amended the provisions in the Insurance through Acts, 2012 and 2015. In such circumstances, comparative study is carried out to find out, changes in the contents for good faith in the Marine Insurance Act, 1963.

It is studied, due to the continuous reforms in the insurance sector, there is no need to make changes in the contents of good faith in the Marine Insurance Act, 1963.

Under the common law principles for insurance, the good faith and duties of disclosure are closely connected with each other. During this study, a Shlok No.19 [Manache Shlok] from Dasbodh was studied.

It is studied, there is a need to balance the mutual duty for disclosure and non-disclosure of the growth in the insurance sector. Hence, it is suggested that, in India, greater regulation and regulatory reforms are expected from IRDA to strike a fairer balance between insurers and consumers/insured for this purpose more research study is necessary. This is a preliminary study and did not cover entire aspects for the above subject.

**Keywords:** Utmost Good faith, disclosure, Non-disclosure, Reasonable search, fair presentation.

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INTRODUCTION:

Insurance is a thing that provides a protection against a possible eventuality.\(^1\) It is a contract (policy) in which an individual or entity receives financial protection or reimbursement against losses from an insurance company. The company pools clients' risks to make payments more affordable for the insured.\(^2\) A coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril.\(^3\) A means of indemnity against a future occurrence of an uncertain event.\(^4\)

While making a contract for the insurance, risk has to be identified. A pure risk is a risk in which there is only a possibility of loss or no loss—there is no possibility of gain. A pure risk can be categorized as personal, property, or legal risk. A pure risk is insurable, because the law of large numbers can be applied to estimate future losses, which allows insurance companies to calculate what premium to be charged will be based on expected losses. A property risk affects either personal or real property. A property loss often involves both a direct loss and consequential losses.\(^5\)

Thus, while understanding peril, it is necessary to know the difference between peril and Hazard. A peril is something that causes, or can cause, a loss, while a hazard is something that makes the occurrence of a peril or loss more likely.\(^6\) The word Risk means uncertainty arising from the possible occurrence of given events that would result in loss with no opportunity for gain. The peril means cause of loss and Hazard is a condition that increases the probability of loss.

Therefore, insurance is the means by which risks of loss or damage can be shifted to another party called the insurer on the payment of a charge known as premium. The party whose risk is shifted to the insurer is known as the insured.

During the negotiation of the contract for the insurance, the proposed insured and insurer has to share the information. In such process, to get knowledge or disclosure and to use own knowledge or experience to understand the cause of action, means to take the risk of the uncertain event. Insurer should be aware what risk he has to accept to fulfill the contract. In

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\(^1\) [https://www.google.co.in/#q=insurance+meaning](https://www.google.co.in/#q=insurance+meaning)  
\(^2\) [http://www.investopedia.com/terms/i/insurance.asp](http://www.investopedia.com/terms/i/insurance.asp)  
\(^3\) [http://www.merriam-webster.com/dictionary/insurance](http://www.merriam-webster.com/dictionary/insurance)  
\(^4\) [http://www.yourdictionary.com/insurance](http://www.yourdictionary.com/insurance)  
\(^5\) [http://thismatter.com/money/insurance/risks-perils-hazards.htm](http://thismatter.com/money/insurance/risks-perils-hazards.htm)  
such a way the insurer takes risk of the uncertain event. Because, the entire contract is based on the principles of utmost good faith which is closely connected with the disclosure and non-disclosure clauses.

The notion of utmost good faith, the cardinal principle governing the marine insurance contract, is a well-established doctrine derived from the celebrated case of Cater v. Boehm[7], decided long before the inception of the Act, 1906 by UK. With the codification of the Marine Insurance Act, 1906, the principle found expression in Sections 19-22.

On January 1, 1907 the law for Marine Insurance was codified in England by Marine Insurance Act, 1906. This was proposed and initiated in an attempt to clarify and set forth the regulations and policy variables associated with marine insurance agreements. This enactment purported to codify only those principles of the law which related exclusively to marine insurance and expressly enacted that the rules of the common law, including the law merchant, save in so far as they were inconsistent with the express provisions of the Act, were to continue to apply to contracts of marine insurance.

The Act, 1906 was enacted for consumer and non-consumer insurance. The Act, 1906 is codified from the common law. It is a settled principle that, the common law cannot overrule or change statues. A statute can only be overruled or amended by another, later statute. Now due to the legislative defects and complexity in practice that was expressed by judiciary and academics, some development are made in statutory reform are carried out. Accordingly, the Consumer Insurance (Disclosure and Representations) Act, 2012 is enacted by amending the Act, 1906, thereby the previous duty to volunteer information to the insurer pursuant to the Marine Insurance Act 1906 is abolished for consumers. So also, since 12 August, 2015 the Insurance Act, 2015 will abolish duty of good faith for non-consumer Insurance Contract.

In India, the Marine Insurance Act, 1906 is adopted with few exceptions and codified Marine Insurance Act, 1963. The Insurance Act, 1938 was a comprehensive legislation. Then following acts are also enacted: The General Insurance Business (GIB) (Nationalization) Act, 1972 and the Insurance Regulatory and Development Authority (IRDA) Act, 1999 are also applicable in insurance business. The Indian Contract Act, 1872 and Companies Act, 1956 and other relevant Acts are applicable in insurance business.

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The insurance sector is divided into two parts, business and non-business but the Marine Insurance Act, 1963 is applicable to both parts. India has continued reformations in the insurance sector. Since 1963, the contents of the Marine Insurance Act, 1963 are same and under IRDA regulations are framed but the contents for the utmost good faith are not disturbed.

Indian enactment is almost based upon the English Counter part but still the significance of insurance law in Indian legal studies has not yet been realized. This may be due to the rules of law prior to the Act, 1963 have been saved by the section 91 of the Marine Insurance Act, 1963.

As the UK has amended the provisions in the Acts, in such circumstances, comparative study is carried out to find out, to make changes in the contents for good faith in the Marine Insurance Act, 1963.

This is a preliminary study on the point of Utmost Good Faith and duties of disclosure. Under the common law principles for insurance, the good faith and duties of disclosure are closely connected with each other. The Marine insurance is a contract of indemnity and it is different from other insurance therefore more disclosure is necessary. In India, these factors always reflects from the contents of the contract by the parties. Therefore, study is carried out for the disclosure and non-disclosure in connections with the Marine Insurance Act, 1963. The Indian courts have tested by judicial verdicts and most of them are based on the judicial verdicts passed by courts for Marine Insurance Act, 1906. It was limitation for the study.

**STUDY FOR UTMOST GOOD FAITH:**

Under Indian law, an insurance contract is based on Principle of Utmost Good Faith. It continuous till the continuation of the contract. The Indian Marine Insurance Act 1963 obliges an insured to make a full and frank disclosure prior to inception and this includes by way of the proposal. The IRDA (Protection of Policyholders’ Interests) Regulations 2002 also imposes an obligation on the insured to disclose all material information. Very importantly the duty of disclosure continues to apply even after the conclusion of the contract.

If there has been a misrepresentation or non-disclosure of a material fact then an insurer may avoid the policy ab initio. Unless the misrepresentation or non-disclosure was fraudulent, the premium must be returned to the policyholder.
The Marine Insurance Act, 1963 is continuously reformed and IRDA has already adopted the clear words for disclosure and utmost good faith in commercial and non-commercial insurance business.

It is studied that, the contents for the good faith that are changed by UK in recent legislature were already adopted by India in its regulations by IRDA. The India has adopted the Act, 1906 but kept open its previous provisions through the section 91 of the Act, 1963. Though the UK has changed the words for the disclosure or non-disclosure by making provisions for consumer and non-consumer insurance but the basic principle of Utmost good faith is not disturbed. In Indian Marine Insurance Act, 1963 though the old contents for utmost good faith are in force but the newly adopted contents by the UK are frequently used in IRDA regulations for the insurance.

Hence it is studied that, there is no need to change the contents of existing doctrine of utmost good faith in the Indian Marine Insurance Act, 1963.

**STUDY FOR DISCLOSURE AND NON-DISCLOSURE:**

During the negotiation for marine insurance contract, the insurer needs information in order to assess the risk. The information received from the insurer will be the foundation upon which the insurer to decide to enter into contract, to fix premium and conditions for the insurance etc. But for the assessment of the risk, the insurer has to use his professional skill and analysis the terms of the contract. Thus, the disclosure is not a unilateral duty. During this process, the insured needs to hand over information regarding the risk to the insurer. When the risk is clarified, the negotiation begins. Actually, it is a process wherein, disclosure of material fact is a mutual duty by both parties.

The insured/ship owner possesses a good track record for his hull and machinery. He knows most of the material facts. So also the insurer can also retrieve the information about the ship and its management from other various sources. It means, both sides have sources to disclose the information for the insurance and its risk.

During the period of insurance or on making claims for the loss, it reveals that, the insurer rejects claims on the basis of non-disclosure of material facts by the insured. The insured alleges that, he had disclosed all material facts, that were known to him or asked by the insurer. He comes with plea that, he had not suppressed the material facts nor disclosed false information. The insurer comes with defence that, the insured was aware about the
material fact and he failed to disclose it therefore the claim is not tenable. 
Thus, it is clear that, during the process of negotiations and contract, the insured to disclose all information relevant to the insurer's decision to accept the risk. It is his duty, not to make false or exaggerated claims. On the other side, the duty of the insurer is not to refuse the claim without proper cause and he has to disclose circumstance or risk that will cover the policy.

**Study from Perspective from Dasbodh [ Manache Shlok No.19]:**

While studying the disclosure and principle of utmost good faith, the researcher has studied a Literature from Dasbodh written by Samarth Ramdas Swami. There are 205 verses and at Shlok Number 19, a good shlok for the disclosure is noticed as:

मना सर्वथा सत्य सांईं नको रे |
मना सर्वथा मिथ्य मांछ नको रे ||
मना सत्य ते सत्य वाचे वदावे |
मना मिथ्य ते मिथ्य सोडून द्यावे || ||

Oh, dear Mind! give up never the eternal truth;
Oh, dear Mind! cling to never the eternal falsehood;
Truth alone speak, with truthful speech, oh Mind!
Untruth hold never, falsehood ever abjure, oh Mind! [8]

*We should never be away from the truth. We should not conceive anything without base.*

*We should speak the truth and shun the baseless.*[9]

Most of the provisions of the Marine Insurance laws are borrowed from common law and on comparison with the common theory explained in the Dasbodh, it clearly shows that, the utmost good faith and disclosure by the parties are very well explained in the Manache sholk No.19.

In Dasbodh it is advised that, never be away from the truth and not to conceive anything without base. Now it is a duty to take reasonable care not to make misrepresentations to insurer. But the misrepresentation is divided wherein the exercise of reasonable care by the consumer will not effect on the policy and if the misrepresentation does not influence the

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8 http://sanskritdocuments.org/doc_trial/manshkeng_unic.html
9 http://www.oocities.org/ssksearch/tulsi/mind/mind5.html
insurer’s decision then there will be no effect on the policy. In Dashbodh, it is advised that, never give up the eternal truth and never away from the truth. Speak the truth and shun the baseless. Thus the range of proportionate remedies depends on the scale of the breach and state of mind of the insurer. It is for the insurer to review that, information is readily available before accepting the risk and he has to prove the non-disclosure and how he would have acted differently if the breach had not occurred. In the Dasbodh, it is explained, what is real and what is not real. The thinking should be pure and never unnecessarily dogmatic about the things which are totally baseless, false and untrue. Thinking should be on the basis of the wisdom and not any imagination. It should come from your experiences and not from any frivolous hypotheses. Thus it is explained that, facts that are material to the risk to disclose. It has differentiated between fraudulent and innocent non-disclosure. The parties should disclose the truth. The parties should not conceive anything without base. The parties should disclose truth only and shun the baseless facts. All these contents are found in Laws from Indian and UK [adopted words] for Marine Insurance. The Dasbodh Manahe Shlok No.19 also explained, utmost good faith that, Do not let go of truth whatever the conditions.

SUGGESTION:

- The proposal form for the Marine Insurance should be in open question/answer form.
- The concept of Reasonable Search is covered narrowly by the IRDA but it should be as per the Insurance Act, 2015 (UK). Thus, greater regulation and regulatory reforms are expected from IRDA.
- **For Non-Disclosure Clause:** It is necessary to clear the legal position that, in the following circumstances, insured is not bound to disclosure for the :-
  a) Circumstances which diminishes the risk;
  b) Circumstances as to which information is waived by the insurer;
  c) Circumstance which is known or presumed to be known to the insurer;
  d) Circumstance which is superfluous to disclose by reason of any express or implied warranty.
CONCLUSION:

The Marine Insurance Act, 1906 from UK, was applicable to consumer marine insurance and non-consumer marine insurance. Now due to the Act, 2012 and Act, 2015, rules relating to pre-contractual non-disclosure and mis-representation are abolished for consumer marine insurance and duty for disclosure and representations is made available. For the non-consumer marine insurance the duty is replaced by, duty of fair presentation. But the basic principles of utmost good faith preserve the fundamental elements though the words like duty for disclosure and representations, duty of fair presentation are adopted to clarify the content.

In India, the doctrine of Utmost Good Faith is applicable to commercial marine insurance and non-commercial insurance contract. It is not separated for both purposes as just now it is separated in UK by amending the Acts 2012 and 2015 and abolishing the provisions from the Marine Insurance Act, 1906.

The marine insurance adds the necessary elements of financial security. Now in the UK Act, 2015 the concept of Reasonable Search is described. This concept is good one and such concept is necessary in the IRDA.

While studying the concept of Utmost Good Faith and disclosure, the shlok No. 19 from Dasbodh is studied, it explained that, we should never be away from the truth. We should never be away from the truth. We should not conceive anything without base. We should speak the truth and shun the baseless.[10] According to Shlok No.19, there is a need to balance the mutual duty for disclosure and non-disclosure for the growth in the insurance sector. Hence, in India, greater regulation and regulatory reforms are expected from IRDA to strikes a fairer balance between insurers and consumers/insured, for this purpose more research study is necessary.

STATUTES:

1) Indian Contract Act, 1872
2) Indian Marine Insurance Act, 1963
3) Motor Vehicle Act, 1939
4) Marine Insurance Act, 1906

6) The Insurance Act, 2015

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2. C L Tyagi and Madhu Tyagi, Insurance Law and Practice, New Delhi Atlantic Publisher, 2007